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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

Nos. 22, 23, 24.

JOHNSON OIL REFINING COMPANY, *Appellant,* *vs.* **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 22.**
JOHNSON OIL REFINING COMPANY, *Appellant,* *vs.* **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 23.**
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APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR THE APPELLANT.

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A.

A single opinion of the Supreme Court of Oklahoma involving four cases, in three of which these appeals are taken, is reported in 162 Oklahoma, 185, and may also be found in 19 Pacific Reporter (2) 169, and at page 57 of the record filed in this court in case No. 22.

A single opinion was rendered, as all four cases involved a single question and were consolidated in that court for hearing. (October 1933 term No. 22-R 47, 48.) Separate judgments were entered in each of the four cases so consolidated. Of the three involved before this court as captioned above, two were consolidated in the trial court, and all three were based on practically the same evidence. There is but one question at issue, which is the same in each case. The records filed in this court, except as to certain formal entries of orders, etc., are practically the same.

Hence in the interest of brevity we submit herewith but one brief and argument, and will refer throughout to record in case No. 22, October term 1933, except as specific reference to the other records may be necessary.

B.

JURISDICTION.

The statements as to jurisdiction having been filed in accordance with the rule of this court, paragraph 1 of Rule 12, and the court having entered its orders noting probable jurisdiction thereon, we respectfully refer to said statements as to jurisdiction for the grounds upon which the court was asked to assume jurisdiction.

C.

STATEMENT.

1. THE QUESTION INVOLVED AND THE ACTIONS OF THE OKLAHOMA COURTS THEREON.

These appeals challenge the right of Oklahoma to tax the appellant, a corporation of the State of Illinois, upon its entire fleet of approximately 387 oil tank cars which during the taxable years in question were constantly employed by it in interstate commerce, and, were actually in Oklahoma only for brief periods of time.

The tax was imposed in each case, despite constitutional objections to be more specifically referred to, on the entire fleet of cars and for their full value on the strength of a statute of the State of Oklahoma, Sec. 1, Chap. 44, Session Laws, 1915, page 64 (Sec. 9574, C. O. S. 1921) which reads as follows:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

The actions of the Supreme Court and the trial courts of Oklahoma in the cases imposing the tax may be summarized as follows:

First. No. 22. This cause was numbered in the Supreme Court of Oklahoma 23218, and involved the right of *Pawnee* County, Oklahoma, to tax for the years *1925, 1926 and 1927* the entire fleet of 387 tank cars on their entire value. It originated under a statute of Oklahoma (see appendix to this brief, page 1, for full copy) through a notice to the Johnson Oil Refining Co. (hereafter referred to as Johnson Co.) by the County Treasurer of a proposed assessment of its entire fleet of tank

cars as property omitted from taxation for the three years in question (22 R. 4). Johnson Co. objected to the proposed assessment, and to the jurisdiction of the County Treasurer to make such assessment, as the property was not located in Oklahoma, and had no taxable situs in his county (R. 6-7). The County Treasurer nevertheless ordered the entire fleet assessed for each of the respective years (R. 8), but no assessment was entered on his books pending an appeal, as provided by statute, where the hearing was *de novo* as a civil action (*Anderson* v. *Ritterbusch*, 22 Okla. 761, 98 Pac. 1009). At the first opportunity, in the County Court of Pawnee County, to which the appeal was taken, and at the request of the court to state the issues involved, Johnson Company objected to the proposed assessment, on the ground that it was in contravention of the Fourteenth Amendment to the Constitution of the United States (22 R. 9-10). The court ruled to the contrary, and the objection was repeated on motion for new trial (22 R. 39-42), which motion was overruled and judgment entered ordering that there be spread on the assessment roll of Pawnee County an assessment against Johnson Company, on the entire fleet of cars, for the years mentioned, in the sum of $570,000, and that a tax be entered on the tax rolls of the county in accordanee with said assessment (22 R. 42-44.). Finally on appeal to the Supreme Court of Oklahoma the same constitutional objections were raised (22-R. 2, 3), but the judgment of the lower court was affirmed (22-R-50, 51).

Second. No. 23. This cause was numbered in the Supreme Court of Oklahoma 23219, and also involved the right of Pawnee County, Oklahoma, to tax the same fleet of cars, but for the year *1928*. It originated under exactly the same procedure as the preceding case, and was consolidated for hearing with it, and the judgment of

the lower court was that the entire fleet be taxed (23-R.-37). The same constitutional objections were raised in this proceeding (23-R.-8, 9, 39, 40). On appeal to the Supreme Court of Oklahoma constitutional objections were again specifically made (23-R. 2, 3) but the judgment of the lower court was affirmed (23-R. 48).

Third. This cause was numbered in the Supreme Court of Oklahoma 23242, and also involved the right of Pawnee County, Oklahoma, to tax the entire fleet of cars, but for the year *1931.* The cause originated, however, before the *Board of Equalization* of that County by notice of proposed assessment of 387 cars for $700 each (24-R. 6), and an order to that effect was entered after a full hearing on evidence practically the same as in the two cases above referred to (24-R. 25). A review of the order was had on appeal under the Oklahoma statute of 1921, Section 9966, in the *District* Court of Pawnee County. The court sustained the objection by the taxpayer that the tax as proposed was unconstitutional and would violate the Fourteenth Amendment to the Constitution of the United States and held that taxation of the entire fleet would amount to a taking of the property of the taxpayer without due process of law, in violation of the Fourteenth Amendment to the Constitution (24-R. 30, 31) and entered its order that the "average" number of cars in the State of Oklahoma, which was found to be 64, should be assessed for taxation in Oklahoma. From that judgment both the County Board of Equalization and the taxpayer appealed to the Supreme Court of Oklahoma (24-R. 2, 3, 32, 33). The taxpayer therein again specifically objected that the inclusion in the assessment against it for taxation of even a portion of the tank cars amounted to a taking of its property without due process of law in violation of the Four-

teenth Amendment to the Constitution of the United States (24-R. 4, 5). The objection also was raised that there was no statute of the State of Oklahoma fixing the situs of such cars, or any portion thereof on the basis of an average of such cars physically present in Pawnee County (24-R. 4 and 5). The Supreme Court of Oklahoma reversed the District Court of Pawnee County in the appeal of the Board of Equalization and held that the entire fleet of cars was taxable for its entire value in Pawnee County for the year in question 1931 (24-R. 37, 41).

Fourth. The fourth case included in the opinion of the Supreme Court of Oklahoma and in which no appeal is taken to this court was numbered in the Supreme Court of Oklahoma 23334 and involved the right of *Osage* County, Oklahoma, a county adjoining Pawnee County, also to collect a tax upon 50 of the same fleet of cars already taxed in the those cases by the adjoining county, and for the same years. The lower court of Oklahoma entered judgment authorizing the tax. On appeal of the Johnson Oil Company the Supreme Court of Oklahoma reversed the lower court (22-R. 50). Hence no appeal is now pending in that particular phase of the matter. It is merely mentioned to avoid any confusion in reading the opinion of the Supreme Court of Oklahoma.

The decision of the Supreme Court of Oklahoma was rendered on the 20th of December, 1932 (22-R. 51). A petition for rehearing was duly filed January 14, 1933 (22-R. 54) where the same constitutional questions were again raised (22-R. 55), and said petition for rehearing was denied on the 31st day of January, 1933 (22-R. 58; 23-R. 56), at which time Judge Swindall of the Oklahoma Supreme Court rendered a dissenting opinion fully sustaining the taxpayer in its contention that the construction of the tax statute of Oklahoma so as to tax the en-

tire fleet of cars was a violation of the Fourteenth Amendment to the Constitution of the United States (R. 58). A petition for appeal to this court was filed March 16, 1933 (22-R. 72; 23-R. 70; 24-R. 59), and an order allowing said appeal was entered on the same date (22-R. 75; 23-R. 73; 24-R. 62).

2. Facts.

The appellant, Johnson Company, was during the years in question an Illinois corporation (22-R. 22; 24-R. 9) licensed to do business in Oklahoma (22-R. 11). It has its principal office and place of business in Chicago, Illinois. The main and principal business of the Company is the marketing and distributing of refined petroleum products (22-R. 21, 22).

That business is almost exclusively interstate (22-R. 12, 22, 31; 24-R. 10), and in its transaction the company employs a large fleet of tank cars, some 387 in number (22-R. 12; 24-R. 10, 17, 18). Ninety-nine per cent of the use of these cars is in interstate commerce (24-R. 23).

The company began operations in 1914, and in 1922 for the purpose of securing a better supply of dependable products bought, and has since operated, a refinery in Cleveland, Pawnee County, Oklahoma (22-R. 22). The products of the refinery constitute the bulk of its merchandise, although it continues to purchase and market like products from other refineries (R-22). The cars are used in its marketing business generally, none of them being allotted or set aside to the refinery (No. 24, R-68). Almost the entire product of the refinery is transported out of the State of Oklahoma either to appellant's customers or to bulk stations owned and operated by it in the states of Indiana, Illinois, Missouri and Wisconsin (22-R. 12; 24-R. 10).

The average time occupied by the shipment and delivery of a load and the return of the empty cars to the refinery for another load is 20 days (R-14). The cars therefore come to Oklahoma on an average of about once and a half a month (R-14). At the trial, it was variously estimated that between 37 and 66 cars were on an average in Oklahoma during the respective years. (22-R. 17, 29). Another estimate was made that 16 per cent of the number of cars owned by the company were on an average in Oklahoma, and about 84 per cent on an average somewhere in transit outside of Oklahoma (24-R. 11).

The cars are used in the appellant's business wherever needed and their movements are directed from the Chicago office of the company (R-23). The office of the company at Cleveland is a record office only, and has nothing to do with the marketing business which is handled entirely from the general office in Chicago (R-23, 27). The cars that do come to the state come for the sole purpose of receiving refinery products to be shipped out of the state (R.-23). The time necessary to load a car is about 24 hours (R.-14, 23).

The cars are an investment in the appellant's marketing business and not in the refinery. They are not a plant facility (R.-34).

Loaded cars are received by the Missouri, Kansas & Texas Railroad at the refinery and are routed over connecting routes to points of delivery. Appellant always has immediate use for its cars (R. 34), in fact they are never at rest in storage, but are continually employed in commerce among the states (R. 21, 34).

The cars when they have been relieved of their load at the point of destination are routed back to the refinery located at Cleveland, unless orders are given to the contrary, in which case they are generally sent to

other places to pick up merchandise which has been bought for marketing by the company (22-R. 13, 23, 33; 24-R. 19, 21). An order is given on the bill of lading directing that the car be returned to Cleveland. This is for the convenience of the customer so he can know the return point to which he is to route the car (R. 34).

Cars are repaired generally by the railroads upon which they are being used at the time the repairs become necessary. Major repairs are made in Kansas (22-R. 28). Only minor repairs are made at the Cleveland plant (22-R. 28; 24-R. 15, 18, 22), and all bills for these repairs are sent to the Chicago office.

Taxes for the years in question were paid by the Johnson Oil Refining Company on these same cars in a large number of states into which the cars travel to make delivery of the refinery products the company has sold (22-R. 25; 24-R. 14).

D.

SPECIFICATIONS OF ERRORS RELIED ON.

The assigned errors in this court are to be found at 22-R. 72. These errors stated in various forms are reducible to one, namely, that the construction of the tax statute in question as put upon it by the Supreme Court of Oklahoma, and as applied in these cases, is repugnant to the Constitution of the United States, particularly, the Fourteenth Amendment thereto, for the reason that as so construed it constitutes the taking of property of the Johnson Company without due process of law.

E.

SUMMARY OF THE ARGUMENT.

No state has the power to tax tangible personal property which is not within its territorial limits.

The imposition of a tax by a state upon tangible personal property not within its territorial limits is a violation of the Fourteenth Amendment to the Constitution of the United States.

This rule applies to movable tangible property which at times is within, and at times without, the territorial jurisdiction of the state.

When movable tangible personal property is in and out of the state for considerable periods of time, the state has power to tax such property only to the extent that it is within its borders. Such taxation must be based upon a formula which will fairly and distinctly reflect the extent to which the property is within the territorial limits of the taxing state.

While the state has such a power the tax can only be imposed when a method within the rules above referred to has been definitely provided for in the statutes of the state.

The cars of the Johnson Oil Refining Company having been taxed in other jurisdictions to the extent that they were in such jurisdictions precludes taxation of the same cars in Oklahoma for the entire period of time and to the extent of their entire value.

The cars of Johnson Oil Refining Company were in and out of the State of Oklahoma and were not within its jurisdictional limits for a large proportion of the time. Therefore, the taxation of the entire fleet of such cars to the extent of their entire value was beyond the

power of the State of Oklahoma, and constitutes a violation of the Fourteenth Amendment of the Constitution of the United States. Hence, the construction by the Supreme Court of Oklahoma of the statute in question violated the Fourteenth Amendment to the Constitution, and the judgments of that court to that effect should be reversed.

F.

ARGUMENT.

I.

THE OKLAHOMA STATUTE AS CONSTRUED BY THE SUPREME COURT OF OKLAHOMA, CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FEDERAL CONSTITUTION.

The Oklahoma statute, already quoted, for convenience sake is again herewith set forth:

> "All property in this State, whether real or personal * * * shall be subject to taxation."

The construction put upon this statute by the Supreme Court of Oklahoma is that the entire fleet of tank cars belonging to the Johnson Oil Refining Company are included in the language, "all property in this State," although those cars were in the state but for short periods of time. That construction by the highest court in the State of Oklahoma must, under the many decisions of this court, be accepted as though the statute in words so read.

Pythias v. *Meyer*, 265 U. S. 30.
Hanover v. *Harding*, 272 U. S. 494.

But the statute as so construed, we maintain, is unconstitutional.

It is fundamental that no state has the power to tax tangible personal property which is not within its territorial limits. Such property cannot acquire an actual situs within the state unless it is actually within the territorial limits of the state.

The decisions of this court establish that proposition.

They further establish the proposition that any attempt to levy such a tax on tangible personal property not within its territorial limits is a violation of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Oklahoma rests its decision to the contrary on a theory that the base of operations for the cars in question was the plant of the Company at Cleveland, Oklahoma, and that they therefore had a definite situs at that point and were there subject to taxation. (R. 52.) The distinction sought to be drawn is between, first, cars which are used in and out of the state indiscriminately without reference to any particular place in the state, and second, cars which are in and out of the state but used with reference to one particular base of operations. The first class the Supreme Court of Oklahoma impliedly concedes would not be taxable. The second class the court holds is taxable. We respectfully submit that no such distinction exists in the rules laid down by this court in its many decisions on this question. On the contrary the reason of the rule precludes any such distinction.

Manifestly, as taxation and protection are reciprocal obligations, the fact that the cars might be used with reference to a single point in the State of Oklahoma, rather than several points, could not enlarge the protection acorded them in Oklahoma, nor lessen the protection accorded the same cars by other states, and their consequent right to tax them in proportion to the protection afforded by the laws of such states.

The true rule with regard to the taxation of tangible personal property is as stated above, and has been settled by the decisions of this court, particularly the case

of *Union Refrigerator Transit Company* v. *Kentucky*, 199 U. S. 194, which is determinative of the entire question. The distinction advanced by the Oklahoma court ignores this rule. In fact it ignores each of the cases of this court which define the rights of states under the constitution in a matter of this sort. Not one of the many decisions of this court is cited in the Oklahoma opinion in support of its judgment though of course they were urged by counsel for the Johnson Oil Company as fundamental considerations in the questions before the court, and the dissenting opinion of Judge Swindall in that court is entirely based on those decisions. We respectfully refer the court to that dissent as a correct statement of the rule of law applicable to this case and as a demonstration of what the decision of the Oklahoma Supreme Court should have been. (R. 58.)

In the case above mentioned of *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, it appears that the State of Kentucky was the taxing authority that imposed the tax. The corporation taxed was of the same state. The home office of the company was also in Kentucky, while its principal office was in St. Louis. (See report of case in opinion of the Court of Appeals of Kentucky, 118 Ky. 131; 80 S. W. 490.)

The corporation owned 2,000 refrigerator cars which it leased out to various parties for use in transportation of goods throughout the United States, Mexico and Canada. The Kentucky statute provided for a taxation of all personal property of corporations organized under the laws of the State of Kentucky "whether the property be in or out of the State." Under this statute a proceeding was instituted to force the company to list the 2,000 cars for state and county taxation. The company resisted and the lower court partially sustained it, to the extent of requiring it to list only such a propor-

tion of the cars as would truly reflect the average number in use in Kentucky during the fiscal year. Under this formula the court found that there was subject to taxation in Kentucky 28 cars for the year 1897, 29 for '98, 40 for '99, and 1,600 for 1900. The remainder were held not subject to taxation in Kentucky. The State of Kentucky appealed to the Circuit Court where the judgment was affirmed. On further appeal by the state the Court of Appeals of Kentucky reversed the lower courts, holding that the company was liable to taxation under the statute upon its entire fleet of 2,000 cars. The court based its holding upon the maxim *mobilia sequuntur personam.*

When the case came to this court on appeal by the Transit Co. the decision was reversed. In its opinion this court notes that the statute quoted above was attacked as being unconstitutional on two grounds, that it denied equal protection of the law and that it denied to the Transit Company due process of law. The court, after reviewing all of the authorities and general principles involved, holds that the statute was unconstitutional as taking property without due process of law, and says: (page 211)

> "We are of opinion that the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that Commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

The court says on page 202:

> "The power of taxation indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as

roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law."

And again the court said, on page 204:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the *Foreign-held Bond* case, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised."

The dissenting opinion of Judge Swindall of the Supreme Court of Oklahoma rests largely upon the Union Refrigerator Transit Company case. The majority opinion without making any reference to it whatsoever seeks to obviate its effect by drawing the distinction above referred to, as follows:

"It (Johnson Oil Refining Company) asserts that

the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. When this property is away from that point it is in transit; but its destination is always Cleveland, Pawnee County, Okla. So the property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. Within the terms of the statute these cars constitute "property within this State." They are merely temporarily absent at times from Cleveland refinery and then in transit for delivery of products at various points. The entire number of tank cars are taxable in Pawnee county." (R. 22.)

In taking this position the court adopted the theory of attorneys for the State of Oklahoma that railroad cars working out of a given point acquire a situs at that point. To this theory they have given the name "the home port" theory. There is no adequate evidence in the record to establish the proposition that the cars in question come within their definition of "home port," but we pass that contention by, as no decision of this court either before or after the Union Transit case, contains any basis for the conclusion that any such distinction exists in law. The fact of the matter is the distinction is entirely contrary to the reason for the rule as laid down in the Union Transit case. We call particular attention to the first reason advanced, namely, that the matter of taxation is reciprocal to the matter of protection, and where the property is not subject to the protection of the state, and in fact is outside of the state's territorial limits it cannot be taxed. The court says, at page 204:

"The argument against the taxability of land within the jurisdiction of another State applies with

> equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws, * * *"

That statement leaves no room for any such theory as advanced by the Oklahoma court. It would be repugnant to the rule to tax a car for its entire value merely because it could be shown as a matter of fact that the car was loaded at a plant in the state in question, left it at once for long journeys through other states, and then came back to the same plant for a repetition of the process. The result is the same. The car is within the borders of the taxing state, subject to its jurisdiction for only a small percentage of the time. And just what bearing on the subject has the fact that the cars operate out of a single place rather than out of a number of places? Certainly if the fact of incorporation by the taxing state (as was the situation in the Union Transit case, above cited) is not sufficient to create a situs in that state for the corporation's tank cars moving in and out of the state, what merit can there be in the assertion that the mere fact that tank cars are moving in and out of a *single plant in a state,* rather than many plants in many states, is sufficient to create a taxable situs of such cars at that plant?

The second reason for the rule as advanced by this court in the *Union Transit* case is:

> "It is essential to the validity of the tax that the property shall be within the territorial jurisdiction of the taxing power." (204)

The cars when they left the State of Oklahoma were not within its territorial jurisdiction, whether in leaving the state they left a single plant or any other place within the state or whether they left to stay out or left to come back.

The rule of law that controls this case may be summed up as follows:

The situs of personal property is the situs of the state of the domicile of the owner, unless it is shown that a different situs exists.

When it is shown that tangible personal property is actually located in a State other than the domicile of the owner, the situs for such property for taxation purposes is the State wherein it is actually located.

When tangible personal property such as a railroad car is in and out of a State, whether at some particular plant or indiscriminately, it has a situs in the State for taxation purposes only for the time that it is actually there.

The rule does not apply to intangibles. They are taxed at the owner's domicile for the purely practical reason that they cannot be found elsewhere.

In one of the most recent discussions by this court of the situs for taxation purposes of personal property, *First National Bank* v. *Maine*, 284 U. S. 312, this court reviewed many of the authorities, among others, the case of *Frick* v. *Pennsylvania*, 268 U. S. 473. That was an inheritance tax case from the State of Pennsylvania, which was the domicile of Mr. Frick. That state imposed a transfer tax on certain tangible personalty having its actual situs in New York. This court held such tax was unconstitutional. In the Maine case above spoken of this court with reference to the Frick case said, in part (page 322):

> "It was by the Frick case, however, that the rule became definitely fixed that, as to tangible personal property, the power to tax is exclusively in the State where the property has an *actual* situs; and this, as will be seen later, has an important bearing on the present case. * * * We decided, pp. 488-492, that the Pennsylvania tax, in so far as it was im-

posed upon the transfer of tangible personalty having an actual situs in other states, was in contravention of the due process clause of the Fourteenth Amendment. Upon a review of former decisions, it was held (1) that the exaction of a tax beyond the power of the state to impose was a taking of property in violation of the due process clause; (2) that while the tax laws of a state may reach every object which is under its jurisdiction, they cannot be given extraterritorial operations; and (3) that as respects tangible personal property having an *actual* situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the owner's domicile.

The tax there under consideration was not a property tax, but one laid on the transfer of property on the death of the owner, and as to that the court said (p. 492):

'But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law'." (Italics ours.)

The court then cites with renewed approval the *Union Transit Company* case, 199 U. S. 194; *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 80, and certain recent cases as follows:

Safe Deposit & T. Co. v. *Virginia*, 280 U. S. 83.
Farmers Loan Company case, 280 U. S. 204.
Baldwin v. *Missouri*, 281 U. S. 586.
Beidler v. *South Carolina Tax Commission*, 282 U. S. 1.

This court continues its opinion in the case of *First National Bank* v. *Maine* (*Supra*) (284 U. S. 312, 326).

"It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last

cited, that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment."

These cases clearly demonstrate that the rule as laid down in the *Union Transit Company* case is the rule today, and that tangible personal property such as freight cars traveling in and out of many states could not possibly acquire an *actual* situs in one state to the *exclusion* of the other states for the entire time because of the simple fact that they were operating out of one plant in one of the states instead of indiscriminately.

The decision of the Supreme Court of Oklahoma refers to several authorities, none of which we submit support the proposition there laid down.

Travis v. *Dickey,* 96 Okla. 256; 222 Pac. 527, after finding that the oil tank cars in question were so far as the record was concerned still in Oklahoma, holds that in the absence of proof of a taxable situs elsewhere than Oklahoma, the presumption was that the situs followed the domicile of the owner.

State v. *Timbrooks Estate,* 129 S. W. 1068. This related simply to the personal property of a decedent who died while a resident of a certain county in the State of Missouri and left a will. His executors immediately moved his personal property out of the county. A statute covered the situation, providing that the property should be taxed at the residence of the decedent, and the holding of the Missouri Court of Appeals was to sustain that statute. It is to be noted that the dispute was between two counties of the same state.

Gulf Refining v. *Tillinghast,* 94 So. 418. This also involved the validity of a statute which fixed the situs of

a certain railroad cars in the county of the domicile of the owner. Another locality disputed the statute and the court sustained it. It is to be noted that here the dispute was between municipalities of the same state.

Upon turning to the citation of 26 R. C. L. 273, we find nothing more than the statement of the general rule that the situs is presumed to be the domicile of the owner, in the absence of proof to the contrary. In paragraph 244 of the same volume, page 276, the same general principle is laid down as was found by this court in the Union Transit Company case.

Prairie Cattle Company v. *Williamson*, 5 Okla. 488; 49 Pac. 937.

This case involved a statute which undertook to tax cattle belonging to a nonresident when the cattle were found in the state. The Supreme Court of Oklahoma upheld the statute, but nowhere was it shown in that case that the cattle were any place else than the State of Oklahoma during the entire taxable period. On the contrary, the court particularly notes that the evidence showed that 600 head of cattle belonging to the company were upon an average for the year 1895 grazing in the township.

II.

THE CARS OF THE JOHNSON OIL REFINING COMPANY WERE IN FACT TAXED IN OTHER STATES. THE RULE OF THE OKLAHOMA COURT WOULD RESULT IN DUPLICATE TAXATION.

It is shown by the record the cars were taxed on an *ad valorem* basis in the states of Ohio, Michigan, Louisiana, Indiana, Georgia, West Virginia, Missouri, Kansas, North and South Dakota, Nebraska, Colorado, Iowa, Mississippi, and Arkansas (22-R, 25, 35; 24-R. 14, 15, 21).

Hence under the decisions of this court they were taxable in the states in which they were used in proportion to their use.

To accept the theory of the Oklahoma Supreme Court that because the cars always left and always were returned to one particular plant in Oklahoma, that plant was their taxable situs would deny to the other states the right to tax these cars to any extent whatsoever.

The problem of taxation of personal property, as this court has so frequently said is a purely practical one. Where it appears that personal property is regularly in and out of several states the practical question presented is the effect of those movements on the taxability of the property. On the one hand the movement cannot mean that it entirely deprives the states of the right of taxation. If so, the property would escape taxation altogether. On the other hand it certainly cannot mean taxation to the entire value of the property in every state. If so, we would have double, triple and quadruple taxation. The practical question, therefore, must have some practical answer, and that practical answer is taxation on an average basis. Hence the decisions of

American Ref. Co. v. *Hall*, 174 U. S. 70.
Union Ref. Co. v. *Lynch*, 177 U. S. 149.
Union Tank Line v. *Wright*, 249 U. S. 275.
Pullman Company v. *Penna*, 141 U. S. 18.

How can it be said that the right of other states to tax the cars of the Johnson Oil Company to the extent that they are used in those states can be denied on the simple theory that those cars had a base of operations in Oklahoma and always left from the same plant and were always returned to that plant? This fact has no part in the basic right of the several states to tax the cars in question.

III.

WHILE IT IS WITHIN THE POWER OF A STATE TO TAX CARS THAT MOVE IN AND OUT OF A STATE, PROVIDED A METHOD IS USED THAT REFLECTS TRULY THE JURISDICTIONAL FACTS, SUCH A TAX CANNOT BE IMPOSED IN THE ABSENCE OF AN ENABLING ACT OF THE LEGISLATURE FULLY DEFINING THE METHOD. AS THERE WAS NO SUCH STATUTE IN OKLAHOMA, NO TAX MAY BE IMPOSED BY THE TAXING AUTHORITIES OF THAT STATE ON THE CARS IN QUESTION.

In *Marye* v. *B. & O. R. R. Co.*, 127 U. S. 117, it was held that while it was competent for the State of Virginia to impose upon the movable personal property of the B. & O. Railroad Company, a corporation of Maryland, which is brought within the territory of Virginia "and there habitually used and employed, the same rate of taxation which is imposed upon similar property used in like way by its own citizens, it has not done so in the taxing laws of the state which were in force when the taxing controversy was imposed." And it was held that the taxation of such property could be enjoined as being beyond the authority of the state.

In *Tamble* v. *Pullman Co.*, 207 Fed. 30, it was held that a state has power to tax movable property of a foreign corporation brought into the state to be there so used and employed, and when such property is not continuously the same, but, as in case of cars, is constantly changing, it may fix the tax by an assessment on the average amount so used. It was held, however, that:

> "In order to exercise such power the state *must by appropriate legislation fix the taxable situs for such movable and changing property, and provide a method and basis for its assessment;* and this the State of Tennessee has not done with respect to passenger cars owned by nonresident corporations." (Italics ours.)

See, also:

State v. *Union Tank Line Co.*, 94 Minn. 320, 102 N. W. 721.

In the case last cited reference was made, in that connection to the case of *American Refrigerator Transit Company* v. *Hall*, 174 U. S. 70, and as to which the court said:

> "The decision is an interesting and important one on the subject of the taxation of the cars of corporations of the class to which the defendant belongs. But it is not relevant to the case at bar, for the obvious reason that we have *no statute* similar to the one involved in that case."

Of course, it will not be disputed that all tax exactions must rest upon legislative enactments, and that all taxing officials must keep strictly within their authority. In *In re Dodge Brothers*, 241 Mich. 665, 217 N. W. 777, 779, it was said:

> "Tax exactions property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer."

In *Avery* v. *Interstate Grocery Co.*, 118 Okla, 268, 248 Pac. 340, the court said:

> "Executive and ministerial officers must, in tax matters, keep strictly within the authority conferred."

In that case the court held that it was competent for the legislature to give commercial vehicles engaged in interstate commerce a *situs* in the state for the purpose of taxation, subject to constitutional and reasonable requirements, but as the legislature had not done so there existed no power to tax them.

Carlile v. *Pullman Palace Car Co.*, 8 Colo. 320, 7 Pac.

164, was a case in which the county authorities of Pueblo County, Colorado, attempted to assess certain sleeping cars of the Pullman Palace Car Company habitually coming into the county. The question decided was that no county in the state had authority to tax the cars, and if taxable at all, the tax could be imposed only by the state, acting through the state board of equalization.

There is no statute in Oklahoma under which a tax may be lawfully levied on these tank cars on an average basis.

Conclusion.

We respectfully submit that in view of these considerations the judgments of the Supreme Court of the State of Oklahoma in the three cases above captioned should be reversed.

Respectfully submitted,

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APPENDIX.

(Tax Ferret Law)

SEC. 9798. *"Contract and Compensation for Discovery.* The board of county commissioners of any county in this State may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed, as required by existing laws, and fix the compensation at not to exceed fifteen per cent of the taxes recovered under this article. Before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten days' notice thereof by registered letter, addressed to him at his last known place of residence, fixing the time and place when objections in writing to such proposed listing and assesment may be made. An appeal may be taken to the county court for the final action of the treasurer within ten days, by giving notice thereof in writing and filing an appeal bond, as in cases appealed from the board of county commissioners to the district court."

SEC. 9799. *Appeal from County to Supreme Court.* Upon an appeal being taken to the county court as provided in section 9798, the county court shall give precedence to the same and shall try and determine the same within thirty days in the manner provided for trial of civil cases, except that no jury shall be allowed. Within sixty days from the final judgment of the county court, appeal may be taken by either party to the Supreme Court of the state as other appeals are taken."

(Compiled Oklahoma Statutes, 1921.)

SEC. 9966. *Appeals from County Board of Equalization—Procedure—Records.* Any taxpayer feeling aggrieved at the assessment as made by the assessor, or the equalization as made by the county board of equalization may, during the session of said board or if the same is closed, within ten days after the first Monday in June, file with said assessor as secretary of said board, a written complaint specifying his grievances and the pertinent facts in relation thereto in ordinary and concise language and without repetition, in such manner as to enable a person of common understanding to

know what is intended; and said board shall be authorized and empowered to take evidence pertinent to said complaint and for that purpose is authorized to compe' the attendance of witnesses and the production of books and papers by subpoena and to correct or adjust the same, as may seem just. And the stenographer of the county court is directed, at the request of the board, or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the action of the board thereof and file the same with his certificate as to its accuracy in the district court, the filing of which transcript shall complete said appeal which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand. In any case where the county board of equalization shall increase the valuation of any property above the value returned by the assessor, the county assessor shall notify, by mail the person in whose name any such property is listed, giving the amount of such valuation as increased, and such person shall have ten days from the mailing of such notice in which to appeal from such valuation, and such notice shall state the limit of time for appeal."

(Compiled Oklahoma Statutes, 1921.)